(9) (9)

Nos. 97-1184 & 97-1243

Supreme Court, U.S.
FILED
JUL 23 1998
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309,
Petitioner,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents.

FEDERAL LABOR RELATIONS AUTHORITY,
Petitioner,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICI CURIAE* OF THE AMERICAN FERERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO IN SUPPORT OF THE PETITIONERS

MARK D. ROTH
80 "F" Steet, N.W.
Washington, D.C. 20001

KEVIN M. GRILE
25 West Chicago Avenue
Suite 410
Chicago, IL 60610

JONATHAN P. HIATT
JAMES B. COPPESS
815 16th Street, N.W.
Washington, D.C. 20006

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

35 pp

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BRIEF *AMICI CURIAE* OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO IN SUPPORT OF THE PETITIONER

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, and the American Federation of Government Employees, a labor organization affiliated with the AFL-CIO which represents approximately 600,000 employees of the United States in certified bargaining units, file this brief *amici curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

Under the Fourth Circuit's view of the Federal Service Labor-Management Relations Statute (FSLMRS or Federal Labor Statute), federal agencies have no duty to negotiate with a certified union after a collective bargaining agreement has been entered into, even with regard to otherwise negotiable subjects not covered by the agreement and even as to matters that the union could not have reasonably brought into the original negotiations. Federal employers may, however, under the court of appeals' statutory interpretation, propose changes in conditions of employment mid-term in a collective bargaining agreement and the union, unless it negotiates concerning those changes, foregoes any later opportunity to do so. This one-sided, inflexible collective bargaining regime is not the one Congress embodied in the Federal Labor Statute.

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[1] No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

That Statute, rather, was enacted for the primary purpose of giving employees a "voice" in shaping their day-to-day working environment, and did not silence that voice once any agreement covering a particular time period is consumated. Rather, the Statute provides generally for mandatory negotiations concerning "conditions of employment," with detailed exceptions that do not state any limit pertinent here. Moreover, the bargaining obligation spelled out by the FSLMRS is, in terms, mutual and symmetrical, not evidencing the fundamental disparity between employer and union obligations posited by the Fourth Circuit. And, the very detail with which the exceptions to the statutory bargaining obligation are enunciated, as well as the elaborate procedures for determining negotiability and for applying those explicit exceptions, are inconsistent with the broad limitation on union-initiated mid-term bargaining that the Fourth Circuit would read into the Federal Labor Statute.

The reasons the Fourth Circuit gave for so expanding the statutory limitations on the bargaining obligation do not stand up. In context, the phrase "a collective bargaining agreement" in two of the many statutory provisions describing the duty to bargain in good faith only refers to the goal of any *particular* set of negotiations, and cannot sensibly be read as precluding overlapping collective bargaining agreements; indeed, the Fourth Circuit, and the respondents, concede that there can be more than one agreement in effect at any given time (or that there can be supplements or amendments to extant agreements), as long as the second set of negotiations are instigated by the employer rather than the union.

The Federal Labor Statute's legislative history, moreover, indicates overall that Congress intended a flexible, broad scope of bargaining, while the snippet of that history relied upon by the Fourth Circuit pertains to a provision that reads differently from the version ultimately enacted and, in any event, cannot sensibly be read to preclude mid-term union-initiated bargaining under the Federal Labor Statute as ultimately enacted. And, contrary to the Fourth

Circuit's conclusion, interpretations of the pre-FSLMRS Executive Order governing federal sector labor relations are of little relevance to duty to bargain issues under the 1978 Statute, and, in any event, are not inconsistent with the proposition that agencies have an obligation to bargain over union-initiated mid-term bargaining proposals.

Policy considerations, most heavily relied upon by the Fourth Circuit, are of little pertinence where the legislative language and structure point clearly in a single direction, as they do here. And, the Fourth Circuit's policy concerns are ephemeral, particularly when the adverse policy consequences of barring union-initiated mid-term proposals while permitting federal employers to make mid-term proposals are considered.

ARGUMENT

The precise issue in this case is whether the following union collective bargaining proposal is "negotiable" under the Federal Service Labor-Management Relations Statute (FSLMRS or Federal Labor Statute):

> Union-initiated Bargaining. The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement. [FLRA Pet. App. 14a.]

The Federal Labor Relations Authority (FLRA or Authority)—the agency Congress charged with determining the scope of federal sector collective bargaining, 5 U.S.C. § 7117(c)—concluded that such "proposals authorizing union-initiated mid-term bargaining are within the duty to bargain under the Statute." FLRA Pet. App. 19a (capitalization and italics omitted).

In so concluding, the FLRA rested, first, on its construction of the Federal Labor Statute stated in *Internal Revenue Service* (*IRS II*), 29 F.L.R.A. 162 (1987)—that the Statute *requires* federal agencies to bargain collectively on a proper union proposal covering some aspects of employment, whether or not there is a collective bargaining agreement in place, as long as any such agreement does not cover the matter submitted for negotiations. The FLRA

added as a second ground of decision that federal agencies at least have the discretion to engage in such so-called mid-term bargaining under the FSLMRS, if the agency so chooses, and therefore a union proposal like the one here is within the scope of bargaining, and both a proper and a mandatory subject for negotiations.

The Fourth Circuit had earlier disapproved the FLRA's understanding of the Federal Labor Statute, concluding that "union-initiated mid-term bargaining . . . would undetermine the congressional policies underlying the statute." *Social Security Administration v. FLRA*, 956 F.2d 1280, 1281 (4th Cir. 1992) (*SSA*); *see* FLRA Pet. App. 6a-7a. *Contra National Treasury Employees Union v. FLRA*, 810 F.2d 295, 301 (D.C. Cir. 1987) (*NTEU*).

This brief addresses the first ground on which the FLRA found the union's collective bargaining proposal proper—that the proposal simply restates the statutory duty to bargain during the term of a collective bargaining agreement.[2] In this regard the FLRA concluded that under

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[2] It is worthy of note, however, that this second ground of decision would be correct even if the first were not.

The Fourth Circuit, after holding in the *SSA* case that the Federal Labor Statute does not mandate union-initiated mid-term collective bargaining, concluded, in *United States Department of Energy v. FLRA*, 106 F.3d 1159 (4th Cir. 1997), that a proposal in the negotiations for an initial collective bargaining agreement permitting mid-term negotiations "is inconsistent with federal law and therefore is not negotiable." *Id.* at 1163, *citing* 5 U.S.C. § 7117(a)(1).

In this case, however, the Fourth Circuit recognized that "agencies are free to negotiate mid-term if they so choose." FLRA Pet. App. 10a. That latter conclusion is entirely correct. There is nothing in the Federal Labor Statute precluding federal employers from engaging in such negotiations. And there may well be circumstances in which an agency will perceive that acceding to a union request to reconsider some policy or working condition during the term of an agreement is in the agency's best interest.

If an agency can negotiate mid-term on union proposals if it so chooses, no reason appears why it would be inconsistent with the Statute for the agency to agree in advance to do so. Indeed, an agency may desire to do so as a means of moving negotiations on

the Federal Labor Statute, as under the private sector labor laws, collective bargaining "involves ongoing communication between the parties, unbroken by the existence of a collective bargaining agreement," so "that a contract does not create a static period in the relationship between the employer and the employees for the term of that agreement." *U.S. Dept. of Health & Human Services, SSA, Baltimore, Md.*, 47 FLRA 1004, 1016-17 (1993). *Compare Jacobs Mfg. Co.*, 94 NLRB 1214, 1219 (1951), *enf'd*, 196 F.2d 680 (2d Cir. 1952) (mid-term bargaining "eliminates the pressure upon the parties at the time when a contract is being negotiated to raise those subjects that may not then be of controlling importance," and "assures to both unions and employers that, if future conditions require some agreement as to matters about which

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the basic agreement along: The union may be willing to agree to a particular provision only if it can be reconsidered at a time certain during the term of the agreement. Such specific reopener provisions are common in the private sector because the parties understand that some terms may not be suitable for the entire term of the agreement, depending upon how circumstances develop. And, absent a provision for mid-term bargaining as to matters not covered by the agreement, the union may insist on negotiating to conclusion upon provisions that it would otherwise be willing to leave alone for the time being because they are of no immediate consequence and never may be. Agencies may well perceive that it is wiser to delay such negotiations because they may involve issues that it proves unnecessary ever to resolve.

Union proposals for mid-term reopener provisions, moreover, if otherwise lawful, come within the bargaining obligation as articulated in the Federal Labor Statute, and are therefore mandatory subjects of bargaining. Negotiating about whether to bargain conclusively now or, instead, later upon request, concerning a single condition of employment or all unaddressed conditions of employment is negotiating "with respect to conditions of employment," (5 U.S.C. § 7102(a)), and thus comes within the employee bargaining rights under the Statute. *See also* 5 U.S.C. § 7103(a)(12) (collective bargaining involves "agreement with respect to the conditions of employment affecting . . . employees"). Nothing in the Statute requires that the result of negotiations about a condition of employment must be an inflexible rule in place for the entire term of the contract, rather than a process for agreeing later upon such conditions.

the parties have not sought, or have not been able to obtain agreement, then some discussion of those matters will be forthcoming when necessary.")

1. It facilitates analysis to begin by setting out the collective bargaining structure envisioned by the Fourth Circuit.

First, according to the Fourth Circuit, a federal agency is obliged to entertain union proposals within the scope of bargaining *only* if the time period covered by that proposal does not overlap with the time period covered by any collective bargaining agreement already entered into concerning any condition of employment within the scope of bargaining. Thus, for example, if the union and the employer reach agreement about certain conditions of employment and chose to execute that agreement and then continue to negotiate about other matters, such further negotiations—at least as the negotiations concern union-instigated proposals—are not within the statutory bargaining obligation, and the employer can walk away from the table.

In contrast, the practice and procedure of collective bargaining generally as it has developed over the years has never been confined within the kind of straight-jacket created by the Fourth Circuit's ruling that any agreement in force precludes further bargaining during its term. On the railroads the basic agreement traditionally has *no* term and bargaining is "opened" on particular subjects without disturbing the "unopened" provisions of the basic agreement. In trucking, and in many other industries, a master "area" agreement covering certain basics is settled and signed and is then supplemented by local agreements on matters peculiar to a locality, a company or a plant. And, in longshoring there is a set of overlapping agreements covering such discrete matters as hiring and referral to work, wages and general working conditions, and the settlement of disputes. Not surprisingly, then, the private sector labor laws do not confine the duty to bargain as the Fourth Circuit would confine the federal sector bar-

gaining duty, but rather recognize, and give proper scope to, the protean nature of the bargaining process.

Second, according to the Fourth Circuit, a federal agency has no duty to bargain once a collective bargaining agreement has been entered into even if entirely new circumstances affecting conditions of employment arise during the term of the agreement. Yet, such circumstances can arise for reasons outside the control of either party to the agreement—a new technology, for example, or an unforeseen statutory change fundamentally affecting the nature of an agency's work and therefore the employees' job tasks—and can thereby profoundly affect employee working conditions.

Indeed, under the Federal Labor Statute, changes in federal laws, rules and regulations may even alter the scope of bargaining. Unions and federal employers are in many instances precluded from negotiating on proposals covered by such laws, rules and regulations. 5 U.S.C. § 7117. Thus, if there is a narrowing change in the coverage of any pertinent law, rule, or regulation during the term of an extant collective bargaining agreement the scope for bargaining may expand. Precluding union-initiated midterm bargaining until the agreement expires delays the negotiation of matters that were not negotiable at the time of the earlier negotiations but become negotiable in this way.

The Fourth Circuit supposes that Congress limited a federal agency's statutory bargaining obligation so as not to reach the impact of such new circumstances or such an enlargement of the scope of bargaining, simply because the parties had earlier entered into an agreement that, out of necessity, in no way addressed those unforeseeable circumstances or that expansion in the scope of bargaining. The likely result, of course, is that employee discontent will fester during the term of an agreement that could not possibly have addressed the reasons for that discontent.

Third, and critically, according to the Fourth Circuit, during the term of a collective bargaining agreement, the Federal Labor Statute imposes an entirely one-sided bargaining obligation: Federal agencies *are* free to propose changes in working conditions whether or not covered by statutory management rights provisions. *Luke Air Force Base, Arizona*, 49 FLRA 137, 137-38, 147 (1994); *Marine Corps Logistics Base, Barstow, California*, 46 FLRA 782, 782-83 (1992); *U.S. Department of Labor, Washington, D.C.*, 44 FLRA 988, 988-89, 994-95 (1992). And unions *are* obligated to bargain concerning those proposals or forego any later negotiations regarding the changes. *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson AFB, Ohio*, 51 FLRA 1532, 1536 (1996).

This asymmetry can only distort both negotiations for initial agreements and mid-term negotiations. Federal agencies, but not unions, can hold back during the original negotiations proposed changes in working conditions and raise them mid-term, or seriatim, when unions have less leverage because they cannot make, or trade-off, their own proposals. And the agencies, but not unions, *can* propose changes in personnel policies and working conditions to respond to externally-caused changed circumstances, with the result that agencies can bargain concerning the impact of external, unforeseen changes if management chooses, but not if management does not so choose.

One would suppose that, had Congress determined to impose such a one-sided bargaining relationship, fundamentally inconsistent with the longstanding understanding in the private sector regarding the bilateral nature of the bargaining relationship, the Legislature would have spelled out its intent to do so in the Federal Labor Statute in no uncertain terms. In fact, however, the Statute contains no such terms. To the contrary the Statute's terms establish a bargaining obligation that is continuing, mutual, and universal with regard to those conditions of employment that are not within any express statutory exception—as we now show.

2. The Federal Labor Statute was passed as "part of a comprehensive revision of the laws governing the rights and obligations of civil servants" and represents "the first statutory scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 91 (1983). "The new Act . . . significantly strengthened the position of public employee unions. . . ." over the limited role such unions had under the series of Executive Orders that governed federal labor relations before 1978. *Id.* at 92.

Congress' judgment embodied in the FSLMRS is that "labor organizations and collective bargaining in the civil service are in the public interest," (5 U.S.C. § 7101(a)), for two reasons: First, Congress found that:

> experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
>
> (A) safeguards the public interest,
>
> (B) contributes to the effective conduct of public business, and
>
> (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment. [5 U.S.C. § 7101(a)(1).]

And, Congress found too that:

> the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government. [5 U.S.C. § 7101(a)(2).]

At the same time—and unlike the National Labor Relations Act, 29 U.S.C. § 151 et seq., and the Railway Labor Act, 45 U.S.C. § 151 et seq., governing most private sector collective bargaining relationships—Congress de-

limited the scope of federal collective bargaining ordinarily to exclude bargaining about wages, benefits, and the other economic terms of employment set by law, (*Fort Stewart Schools v. FLRA*, 495 U.S. 641, 649 (1990)), and maintained the long-standing prohibition on federal employee strikes (5 U.S.C. § 7116(b)(7)(A)).

Taken together, Congress' express findings and the limitations placed upon both the role of collective bargaining and the protection of employee concerted activities indicate that in enacting the FSLMRS, Congress was primarily interested in giving employees a "voice" in shaping the day-to-day operations of the workplace, one of several functions performed by collective bargaining through a labor union. *See* Richard Freeman and James Medoff, *What Do Unions Do?* ch. 6 (1984) ("The Exit-Voice Tradeoff").

3. To accomplish this basic purpose, the Federal Labor Statute "prescribe[s] certain rights and obligations of the employees of the Federal Government and . . . establish[es] procedures which are designed to meet the special requirements and needs of the Government." 5 U.S.C. § 7101(b). In particular, Congress included a number of different, albeit functionally intersecting, provisions describing the bargaining relationship in the federal sector.

The most basic employee right prescribed by the Federal Labor Statute is "the right to form, join, or assist any labor organization," which "includes the right . . . to engage in collective bargaining *with respect to conditions of employment* through representatives chosen by employees under th[e] [Statute]." 5 U.S.C. § 7102 (emphasis supplied). To implement this right, the Statute provides for "exclusive recognition [of] a labor organization . . . [that] has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit. . . ." (5 U.S.C. § 7111(a)), and states that "[a] labor organization which has been accorded exclusive recognition . . . is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit," (5 U.S.C. § 7114(a)(1)).

Collective bargaining, in its turn, is defined as:

> the performance of the *mutual obligation* of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency *to meet at reasonable times* and to consult and bargain *in a good-faith effort to reach agreement with respect to the conditions of employment* affecting such employees and to execute, if requested by either party, a written document incorporating *any collective bargaining agreement* reached . . . [5 U.S.C. § 7103 (a)(12)) (emphasis supplied).].

And, a "collective bargaining agreement" is "an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter." 5 U.S.C. § 7103(a)(8). The FSLMRS, moreover, broadly defines the "conditions of employment" subject to "collective bargaining" as those "personnel policies, practices, and matters . . . affecting working conditions. . . ," (5 U.S.C. § 7103(a)(14)), with certain stated exceptions not pertinent here.

The Federal Labor Statute, then, describes the right to bargain collectively as a right going to covered conditions of employment *generally*. As far as appears, the right to bargaining collectively with regard to conditions of employment does not lapse once agreement is reached regarding *some* conditions of employment. Certainly there is nothing in the Statute exempting from the bargaining obligation the conditions of employment *not* covered in any agreement already negotiated. Indeed, by stating the union's right to bargain as encompassing the right to negotiate "collective bargaining *agreements*" (5 U.S.C. § 7114 (a)(1) (emphasis supplied)), the Statute reenforces the point that there is *no* statutory preclusion on negotiating more than one agreement, covering different conditions of employment. Similarly, the definition of "collective bargaining agreement" covers *any* agreement reached as a result of bargaining over conditions of employment, whether that agreement is broad or limited. Nothing in the statute excludes from the definition of "collective bargaining agreement" an agreement concerning a single condition of

employment or a few such conditions, leaving other conditions of employment for possible later discussion and agreement.

The Federal Labor Statute goes on to specify that "[a]ny agency *and* any exclusive representative in any appropriate unit . . . shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement." 5 U.S.C. § 7114(a)(4) (emphasis supplied). The Statute then specifies in a single set of four subsections the obligations encompassed in "[t]he duty of any agency *and* an exclusive representative to negotiate in good faith." 5 U.S.C. § 7114(b)(1), (2), (3) & (5) (emphasis supplied); *compare* 5 U.S.C. § 7114(b)(4) (specifying one aspect of the duty to negotiate in good faith, not here applicable, that applies only "in the case of any agency"). The Statute makes it equally "an unfair labor practice for an agency . . . to refuse to . . . negotiate in good faith with a labor organization as required," as "for a labor organization . . . to refuse to . . . negotiate in good faith with an agency as required." 5 U.S.C. § 7116(a)-(a)(5) & (b)-(b)(5). And again, the "duty of *an agency and an exclusive representative* to negotiate in good faith" includes the obligation "to meet at reasonable and convenient places as frequently as may be necessary . . ." 5 U.S.C. § 7114(b)-(b)(3) (emphasis supplied).

The bargaining duty, thus, is in almost all respects both "*mutual*" (5 U.S.C. § 7103(a)(12) (emphasis supplied)) and symmetrical, with conjunctive and parallel provisions making clear that the obligation of both parties to the negotiations is, except as otherwise provided in one minor respect, precisely the same. Nothing in the language or structure of the Federal Labor Statute suggests that federal employers have broader authority to instigate negotiations than do certified unions, or narrower responsibility to negotiate on proposals raised by the other party. And, while that mutual obligation requires that each party approach any negotiations over conditions of employment with the purpose of reaching "a collective bargaining

agreement" (5 U.S.C. § 7114(a)(4)) as a result of the negotiations, the Statute does not suggest that having reached one agreement in earlier negotiations excuses the parties from attempting to reach another agreement in a second set of negotiations covering matters not negotiated earlier.

Indeed, the respondents in this case, and the court below, so understand the statute as it affects *employer* bargaining proposals, recognizing that federal agencies may make proposals to change working conditions after an agreement has been negotiated, and are obligated to bargain about such proposals on request if they are otherwise within the scope of bargaining. In such negotiations, the statutory definition of the duty to bargain still applies, including the obligation to negotiate with the purpose of reaching "a collective bargaining agreement," and any agreement reached as a result of the negotiations is "a collective bargaining agreement," albeit an additional (or supplemental) agreement to any extant agreement. *Compare* NLRA § 8(d), 29 U.S.C. § 158(d) (describing the obligation to bargain collectively as including "the negotiation of an agreement," a locution that has never been understood as suggesting that there cannot be later negotiations also directed at "negotiation of an agreement.")

As to the substantive scope of bargaining, "[i]n general, unions and federal agencies must negotiate over terms and conditions of employment, unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation." *Bureau of Alcohol, Tobacco & Firearms, supra,* 464 U.S. at 92; *see* 5 U.S.C. § 7117(a) (spelling out in detail which regulations preclude negotiations, and providing that certain kinds of regulations are not preclusive unless the FLRA determines that there is a "compelling need" for the regulation). Further, "[t]he Act's expansive duty to bargain is subject to several . . . *express* exceptions," (*Library of Congress v. FLRA*, 699 F.2d 1280, 1284 n.16 (D.C. Cir. 1983) (emphasis supplied)), enumerated in another detailed section specifying the management rights not subject

to negotiation, as well as limitations on those management rights permitting negotiation of procedures for implementing management's authority and arrangements for employees adversely affected, (5 U.S.C. § 7106).

Precisely because of the detail with which the duty to bargain is described, "[t]he statutory framework . . . may be envisioned as imposing a broadly defined duty to bargain over conditions of employment that is subject only to the express statutory exceptions." *Library of Congress,* 699 F.2d at 1285. And, because those exceptions are quite complex, the Federal Labor Statute provides elaborate schemes, to be supplemented by FLRA regulations, for determining whether or not a proposal is within the scope of bargaining where there is a dispute regarding that question between the parties at the bargaining table. 5 U.S.C. § 7117(b) and (c).

The substantive and procedural detail with which the Federal Labor Statute covers questions concerning the scope of bargaining strongly suggests that Congress did not intend by its silence to impose a limitation on the employer bargaining obligation not contained in any of the provisions creating exceptions to that obligation. Given the less significant bargaining issues the Statute addresses, the fair inference is that if Congress intended to exclude from the scope of bargaining conditions of employment that were not, and in many instances could not have been, included in the original negotiations and agreement, the Legislature would have spelled out that exclusion in detail as it did the exceptions for management rights and for issues covered by laws and regulations.

It is very much to the point that any such exclusion would, of course, require unions to try to anticipate, in initial negotiations, any and all issues concerning conditions of employment that are not yet of any immediacy but could possibly arise during the term of the agreement. Yet, the procedures that are established in the Federal Labor Statute for determining negotiability are ill-adapted to deter-

mining negotiability in the sky, rather than in the context of a concrete dispute. Determination of whether there is a "compelling need" for a regulation may well differ from time to time, depending upon external circumstances. And, the resolution of management rights disputes, as well, is likely to be enhanced if the parties, and the FLRA, can consider a ripe dispute in the context of an actual managerial decision, rather than a dispute in which the union makes proposals to cover contingencies in managerial decision-making that have not yet occurred and may never occur.

In short, an analysis of the statutory language and structure shows that it is at least as true of the Federal Labor Statute as it is of the NLRA that "the general purpose of the Act . . . is to require employers to bargain as to employee demands *whenever made* to the end that industrial disputes may be resolved . . ." *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2d Cir. 1952) (emphasis supplied).

4. The Fourth Circuit, however, concluded otherwise in the *SSA* case and, in elaborating on *SSA* later, added that "union-initiated mid-term bargaining . . . would undermine the congressional policies underlying the statute," *Dept. of Energy, supra*, 106 F.3d at 1163 (emphasis in original), quoting *SSA*, 965 F.2d at 1281. Nothing in the reasoning of *SSA*, however, undermines the conclusion that Congress simply did not embody in the overall statutory language or structure the one-sided, inflexible collective bargaining regime the court of appeals supposes, and certainly did not do so with the clarity required to impose a judicial interpretation of the Federal Labor Statute on the FLRA, the agency entrusted by Congress with construing and applying the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (agency interpretation is entitled to deference if "the statute is silent or ambiguous with respect to the specific issue.")

a. The *SSA* opinion begins with the statement that "[t]he starting point for our analysis . . . must be the

language of the statute." 956 F.2d at 1284. That is, of course, indubitably correct, as this Court has had occasion to stress repeatedly in recent years. *See, e.g., United States v. Alvarez-Sanchez,* 511 U.S. 350, 356 (1994); *Negonsett v. Samuels,* 507 U.S. 99, 104-05 (1993). But the *SSA* analysis of the Federal Labor Statute's language and structure ignores most of the relevant provisions and misreads those upon which that analysis does rely.

(i) Primarily, *SSA* relies on the slim reed that the use of the article "a" in the reference to "*a* collective bargaining agreement" in §§ 7114(a)(4) & 7114(b)(1) (emphasis supplied) demonstrates that "Congress addressed the duty to bargain in language that seems to contemplate that such a duty arises as to only *one*, basic agreement." 956 F.2d at 1284 (emphasis supplied). At the same time, *SSA* dismisses the fact that "[t]he FSLMRS does use the plural 'agreements' " in § 7114(a)(1) "merely as a generic statement that contemplates successive, not overlapping, labor contracts." 956 F.2d at 1284, n.1.

Picking and choosing in this manner between statutory provisions that arguably pull in different directions is hardly the business of a court reviewing an agency statutory construction. In any event, as the discussion in point 3, *supra*, illustrates, the definitions of "collective bargaining" and "collective bargaining agreement" in the Federal Labor Statute make clear that the terms apply generically to *any* negotiations concerning conditions of employment and to any resulting agreement, respectively, and do not delineate the scope of the negotating obligation.

Indeed, the "scope of the negotiating obligation is set forth in § 7102," (*Fort Stewart Schools, supra*, 495 U.S. at 644), not § 7114(a)(4), and § 7102 does *not* use the phrase "a collective bargaining agreement," but rather defines a general duty "to engage in collective bargaining with respect to conditions of employment," (5 U.S.C. § 7102(2)). And, as we have shown (point 3, *supra*), there is nothing in the FSLMRS to suggest that this duty

is suspended during the term of a collective bargaining agreement.

Moreover, the Fourth Circuit's own reading of the Federal Labor Statute as a whole makes clear that the court of appeals' understanding of § 7114(a)(4) cannot be correct. That reading recognizes that "an agency [is] obligated to bargain mid-term over the impact and implementation of changes in the conditions of employment initiated by the agency." 956 F.2d at 1284; *see also Brief for the Respondent in Opposition*, at 12 (the Statute contemplates that "the agency-employer will be required to bargain during the term of a collective bargaining agreement . . . where the agency initiates changes in the conditions of employment.") Thus, the Statute indubitably *does* contemplate negotiations during the term of an initial collective bargaining agreement, and necessarily contemplates as well overlapping agreements.

The generic statutory provisions delineating "the duty of an agency and an exclusive representative to negotiate in good faith," (5 U.S.C. § 7114(b)), apply on their face as much to employer-initiated mid-term bargaining mandated by the FSLMRS as to any other negotiations mandated by the Statute, and any agreement reached as a result of such negotiations is *a* "collective bargaining agreement" as defined by the Statute, (*see* 5 U.S.C. § 7103 (a)(8)). The references in § 7114 to "a collective bargaining agreement", therefore, certainly apply to mid-term employer-instigated bargaining, and, as such, cannot indicate an intention to limit the parties' bargaining obligation to negotiating and consumating a single agreement covering a particular time period. Rather, the point of that reference can only be to specify the agreement toward which any *particular* set of negotiations are directed.

Finally, that the Federal Labor Statute *does* "contemplate . . . overlapping[] labor contracts" is further confirmed by § 7114(c)(4), which specifies the procedure for approving "[a] local agreement subject to a national

or other controlling agreement at a higher level." 5 U.S.C. § 7114(c)(4).

In the overall statutory context, then, the phrase "a collective bargaining agreement" in §§ 7114(a)(4) & 7114(b)(1) is most sensibly read as a generic statement that *each set* of negotiations, however initiated, should be undertaken "for the purposes of arriving at a collecitve bargaining agreement" on the particular matters being discussed in *those* negotiations. 5 U.S.C. § 7114(a)(4).

(ii) The *SSA* court found further support for its reading of the Federal Labor Statute in the fact that "Congress did contemplate that an agency was obligated to bargain mid-term over the impact and implementation of changes in the conditions of employment initiated by the agency. *See* 5 U.S.C. § 7106(b)(2) and (3)." 956 F.2d at 1284. The provision for employer-instigated negotiations is significant, in the court of appeals' view, because "[t]he inclusion of a specific duty of mid-term effects bargaining . . . suggests the inadvisability of reading a more general duty into the statute." *Id.*

But the statutory provision on which the *SSA* court relied does *not* create any "specific duty" to engage in "mid-term effects bargaining." Rather, that provision, like all the other provisions governing the duty to bargain collectively in the Federal Labor Statute, is written generally, without regard to whether the proposal triggering the duty to negotiate is made during initial bargaining or after the parties have entered into an initial agreement. *See* 5 U.S.C. § 7106(b) ("[n]othing in this subchapter shall preclude any agency and any labor organization from negotiating . . . procedures which management officials of the agency will observe in exercising any authority under this section; or . . . appropriate arrangements for employees adversely affected by the exercise of any authority under this section . . ."). Far from demonstrating that Congress specified mid-term bargaining when it intended such bargaining, then, the universally accepted understanding that Congress intended in enacting § 7106(b)

to require bargaining under that section whenever not otherwise precluded by the Statute or by contract points to the opposite conclusion—that Congress did not include an express limitation on mid-term bargaining with respect either employer or union initiated proposals because no such limitation was intended.

b. The *SSA* court, in addition, found support for its conclusion that "an agency's duty to bargain arises in only two contexts"—"during negotiations leading to 'a basic collective bargaining agreement' " and "in response to mid-term changes by the agency in conditions of employment," (*SSA*, 956 F.2d at 1285), in the following passage from the Senate Report accompanying the Senate bill to reform federal sector labor relations:

> [The bill] provides that the agency and the labor organization shall negotiate in good faith for the purpose of arriving at an agreement. [¶] The parties have a mutual duty to bargain not only with respect to those changes in established personnel policies proposed by management, but also concerning negotiable proposals initiated by either the agency or the exclusive representative in the context of negotiations leading to a basic collective bargaining agreement. Where agency management proposes to change established personnel policies, the exclusive representative must be given notice of the proposed changes and an opportunity to negotiate over such proposals to the extent they are negotiable. [956 F.2d at 1284-85, *quoting* S. Rep. No. 969, 95th Cong., 2d Sess., 104 (1978).]

(i) As a general matter, of course, legislative history may not be used to override clear statutory language. *See, e.g., West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1991); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 211 (1989). For all the reasons discussed above, nothing in the FSLMRS suggests the *non*mutual, one-sided mid-term bargaining obligation the Fourth Circuit read into the above-quote passage of a

single committee report, and there is therefore no basis for resorting to legislative history in that regard.

Additionally, "legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute." *American Hospital Association v. NLRB*, 499 U.S. 606, 617 (1991). The Senate bill provision discussed in this passage—S. 2640, 95th Cong., 2d Sess. § 7215(a) (1978)—is *not* the same as present §§ 7114(a) and (b), and did *not* contain the phrase "a collective bargaining agreement," the only actual operative statutory language upon which the *SSA* court relied in interpreting the Federal Labor Statute. Rather, the Senate bill section stated that "the exclusive representative of employees in the unit . . . is entitled to act for and negotiate *agreements* covering all employees in the unit." S. 2640, § 7215(a)(1) (emphasis added).

Further, the Senate bill, as the snippet of legislative history quoted confirms, *did* intend to impose a duty on federal sector employers and unions to "negotiate agreements," (S. 2640, § 7215(a)(1)), that encompassed not only the negotiation of "a basic collective bargaining agreement" but also the negotiation of more limited agreements resolving disputes over "agency management propos[als] to change established personnel policies," (S. Rep. No. 969, *supra*, at 104). And, there is nothing in the Senate bill to indicate that the duty to "negotiate agreements" was limited during the term of any basic collective bargaining agreement to agency-initiated negotiations, much less that purports to explain why only management should be allowed to initiate mid-term bargaining. The Senate Report in other words, does not provide support for the Fourth Circuit's construction of the term "a collective bargaining agreement" in § 7114 as finally enacted.[3]

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[3] When the Senate Report meant to preclude mid-term bargaining, the Report was quite express on the point. Thus, in explaining § 7282 of the Senate bill, which allowed federal employees to take paid "official time" for certain negotiations, the Senate Report stated that grants of official time were limited to negotiations

(ii) To this point, we have indulged the *SSA* court's notion that the Senate Report is the key to understanding the duty to bargain under FSLMRS. In fact, however, the Senate Report is of little pertinence to divining Congressional intent in passing the final Federal Labor Statute. The Senate bill was replaced wholesale by an amendment introduced in the House of Representatives by Representative Udall, and that amendment, with exceptions not here pertinent, was the basis for the Statute as enacted.

The House version of the bill that became the FSLMRS provided for a considerably wider range of collective bargaining than the Senate bill. *See National Treasury Employees Union v. FLRA*, 691 F.2d 553, 559-561 (D.C. Cir. 1982); *compare, e.g.*, 124 Cong. Rec. H9649 (daily ed. Sept. 13, 1978) (remarks of Rep. Ford) (Udall amendment "make[s] clear . . . that the scope of bargaining would be substantially broadened from that permitted agency management under the [Executive [O]rder]" with S. Rep. No. 969 *supra* ("The scope of negotiations . . . is the same as under . . . [the] Executive Order."). While there were no changes from the Senate to the House bill directly pertinent to the question of mid-term bargaining, that is because nothing in either bill, or in the Federal Labor Statute as finally enacted, places *any* limitation relevant to mid-term bargaining on the general scope of bargaining, as we have already explained.

The general thrust of the legislative history of the bill that *was* enacted, the Udall amendment, confirms that it is this *omission* of any explicit limitation that is significant.

"relating to the negotiation or renewal of a basic collective bargaining agreement, *as opposed to negotiations which arise out of circumstances during the term of the basic agreement (midcontract negotiations)*." S. Rep. No. 969 at 112 (emphasis added). (This limitation on "official time" was *not* included in the bill as finally enacted. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 672 F.2d 732, 736-737 (9th Cir. 1982), *rev'd in part on other grounds*, 464 U.S. 89, 92 (1983), *see American Federation of Government Employees v. FLRA*, 750 F.2d 143, 147 (D.C. Cir. 1984)).

For that history makes clear that Congress' actual intent was to enact "the general obligation to bargain in good faith over conditions of employment," to make the limits on that obligation express so as to preclude limiting administrative interpretations—and to proceed in that way in order to "change the current situation and, wherever possible, encourage both parties to work out their differences in negotiations." 124 Cong. Rec. H9649 (daily ed. Sept. 13, 1978) (remarks of Rep. Ford); *see also* 124 Cong. Rec. H9637 (daily ed. Sept. 13, 1978) (remarks of Rep. Clay) ("In enacting [the Federal Labor Statute] Congress will free both agency management and employee representatives from the strictures of the past, and thereby encourage both management and labor to engage in the kind of relationship that, in the private sector, has fostered the single most productive economy in the world.")

c. The *SSA* court also found it significant that "[t]he FLRA has presented no evidence that union-initiated mid-term bargaining occurred under the Executive Order" that governed federal sector labor relations prior to the enactment of the FSLMRS. 956 F.2d at 1286.

In the first place, as already discussed, the point of the Udall amendment was intended precisely to *preclude* reliance on pre-1978 interpretations under the Executive Orders in elaborating the new Federal Labor Statute bargaining regime. *See also,* 124 Cong. Rec. H9637 (daily ed. Sept. 13, 1978) (remarks of Rep. Clay) (the Statute "obviously represents congressional dissatisfaction with the state of labor-management relations in the Federal service under the various oversight bodies now established"); *id.* at H9638 ("the scope of collective bargaining under the act would be greater than that under the order as interpreted by [the Federal Labor Relations Council];" *id.* (the Statute "constitutes a clear rejection of the Council's interpretive techniques" because of the Council's "haste to restrict the scope of bargaining.")

The fragmentary Executive Order experience is, in any event, of a limited and ambiguous nature. The Assistant

Secretary of Labor for Labor Management Relations, the official with responsibility for administering the Executive Order, expressed the view that "a term and condition of employment, although not treated expressly in the parties' most recent negotiated bargaining agreement, became and remained a matter upon which both [labor] and [management] were obligated to meet and confer if *either* desired a modification." *Dept. of Transportation, Federal Aviation Administration*, 5 A/SLMR 344, 347 (1975) (emphasis added). Consistent with this view, the Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, As Amended (January 1975), stated that "[s]ection 11(a) [of the Executive Order] comprehends an obligation to 'negotiate' with respect to midcontract changes in established personnel policies and practice and matters affecting working conditions." *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* ("Leg. Hist."), at 1313 (Comm. Print 1979).

Both of these statements on the Executive Order law are congruent with the FLRA's interpretation of the Federal Labor Statute, and not the Fourth Circuit's. And, while the one case discussed in this section of the FLRC Report did involve bargaining over management-initiated changes, the rationale for mid-term bargaining extended to union-initiated proposals as well:

> The Order is predicated on an assumption that "the well-being of employees and efficient administration of the Government are benefitted by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment. . . ." We have found no reason during the course of the current review to doubt the wisdom of this assumption, nor have we found any basis to conclude that employee participation in these matters is any less critical to their well-being, or the efficient administration of Government during the term of an

> agreement, than it is during the relatively brief period of formal contract negotiations. On the contrary, the fact that changes in established personnel policies and practices and matters affecting working conditions during the term of an agreement are often the result of changes in circumstances which were not foreseen by either party during the period of contract negotiations make it appear likely that employee participation at such junctures may be even more important than during the regular negotiation period. [*Id.* at 1312-13.][4]

d. In the end, the *SSA* decision rests not on the statutory language or on the legislative history addressed to the particular issue of union-initiated mid-term bargaining, but rather on the court of appeals' view that "[u]nion-initiated mid-term bargaining risks serious interference with th[e] most basic of statutory objectives," *viz.*, "protect[ing] the 'paramount right of the public to as effective and efficient a Government as possible.'" 956 F.2d at 1288, quoting H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 154 (1978).

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[4] The FLRA's determination in *Internal Revenue Service (IRS I)*, 17 FLRA 731, 736 (1985), *reversed, NTEU, supra*, cited in *SSA*, 956 F.2d at 1286, that "an obligation to negotiate union initiated mid-term bargaining proposals did not exist under the Executive Order" rested on an obvious misreading of the Assistant Secretary of Labor's decision in *Army and Air Force Exchange Service, Capitol Exchange Region Headquarters*, 2 Rulings in Request for Review 561 (Ass't Sec. of Labor 1976). While the Acting Regional Administrator dismissed a refusal to bargain complaint in that case in part on the grounds that there was no duty to engage in mid-term bargaining over union-initiated proposals, the Assistant Secretary of Labor did *not* sustain his decision on that ground. Rather, the Assistant Secretary found that "the parties' negotiated agreement" already covered the union proposal and that, even so, "the parties, in fact, met and conferred over" the union mid-term proposal. *Id.* And, the Federal Labor Relations Council later confirmed that this was the basis for the dismissal of the complaint in that case. *Army and Air Force Exchange Service*, 5 FLRC 167 (1977). There is nothing in the final disposition of that case suggesting that there was no general duty to bargain over mid-term union proposals under the Executive Order.

Relying upon the FLRA's now superseded decision in *IRS I*, the *SSA* court advanced the following reasons for concluding that "union-initiated midterm bargaining would . . . contravene many of the basic purposes of the FSLMRS":

> [U]nion-initiated mid-term bargaining would diminish "the ability of the parties to rely upon . . . basic [collective bargaining] agreements as a stable foundation for their day-today relations." *IRS I*, 17 FLRA at 736. Moreover, "[p]arties would be discourage from engaging in the effort, as part of negotiation of their basic collective bargaining agreement, to foresee potential labor-management relations issues, and resolve those issues in as comprehensive a manner as practicable." *Id.* Rather, as explained above, permitting union-initiated midterm bargaining "would encourage dispersal of the collective bargaining process" and thereby result in seriatim mid-term bargaining—and then seriatim FSIP arbitration—over individual issues raised midterm. *Id.* at 736-737. Such an approach to federal-sector labor relations would "enhance the prospect for protracted conflict" that undermines an agency's effectiveness and would result in the "continuous expenditure of resources for both management and [union] representatives." *Id.* at 737. [956 F.2d at 1288.]

(i) As the District of Columbia Circuit noted in *NTEU v. FLRA*, *supra*, the most immediate response to the point that "mid-term bargaining over union proposals would inject uncertainty into labor-management relations, undermine stability in the workplace, and increase the prospect for conflict" is that "Congress . . . has already drawn the opposite conclusion" . . ." 810 F.2d at 300. For, as a general matter, courts may not override the operative statutory language and structure in pursuit of a generally-stated statutory purpose. *Brogan v. United States*, —— U.S. ——, 118 S. Ct. 805, 809 (1998); *Director, Office of Workers' Compensation v. Newport News*, 514 U.S. 122, 135-36 (1995).

Even if one entertains the contrary possibility, the Fourth Circuit entirely imsunderstood Congress' purpose in enacting the FSLMRS. The statement that the Statute is to be interpreted "in a manner consistent with the requirement of an effective and efficient Government," (5 U.S.C. § 7101(b)), is part of a more comprehensive statement of Congress' purpose premised upon the clearly stated view that "labor organizations and collective bargaining in the civil service are in the public interest," (5 U.S.C. § 7101(a)). Thus, the direction that "[t]he provisions of [the FSLMRS] should be interpreted in a manner consistent with the requirement of an effective and efficient Government," was made against the background of specific Congressional "find[ings]," based on "experience in both private and public employment," that "protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them" both "contributes to the effective conduct of public business" and "facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." 5 U.S.C. § 7101.

In short, although the Fourth Circuit may disagree, Congress' view was that permitting employees to express their views through their union concerning conditions of employment in most instances ultimately advances rather than compromises the cause of efficient government. *See* pp. 21-22, *supra* (summarizing legislative history so indicating). And, it has been the "experience in both private and public employment," (5 U.S.C. § 7101(a)), that "making mandatory the discussion of bargainable subjects not already covered by a contract . . . encourage[s] the parties . . . to arrive at joint decisions with respect to bargainable matters, that, at least to the party requesting discussion, appear at the time to be of some importance," (*Jacobs Mfg., supra,* 94 NLRB at 1217). In the absence of any contrary indication in the Federal Labor Statute's various general descriptions of the duty to bargain, there is no occasion for an interpretation that overrides the express

statutory balance between the employees' right to participate in the formulation of day-to-day policies governing the workplace and federal employers' managerial authority, particularly where that "interpretation", by "allow[ing] management to retain the right to raise new issues, but . . . deny[ing] that right to the employees' representatives would produce an inequality in bargaining power" and thereby "violate a guiding purpose of the statute." *NTEU*, 810 F.2d at 301.

(ii) Nor do the Fourth Circuit's more particularized fears concerning the impact of union-initiated mid-term bargaining have sufficient force to justify that court's interpretative tour-de-force.

First, the court of appeals' expressed concerns about seriatim mid-term bargaining are largely answered by the FLRA's conclusion that the statutory bargaining obligation with regard to a particular subject matter is met in bargaining for an initial collective bargaining agreement where the agreement "covers" that matter. By recognizing this inherent, bilateral limitation on the duty to bargain under the Federal Labor Statute, the Authority met a perceived "need to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement." *U.S. Department of Health and Human Services, Social Security Administration* 47 FLRA 1004, 1017 (1993), *quoting Dept. of Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992).

In this regard, the FLRA does *not* "require an exact congruence between a provision of a contract and a proposal offered by a union in order for an agency to have no duty to engage in mid-term bargaining on the matter. . . ." *U.S. Department of Health and Human Services, supra*, 47 FLRA at 1017. Rather, if "the subject matter of the [mid-term] proposal is . . . commonly considered to be an aspect of the matter set forth in [a] provision . . .

negotiations [will be] presumed to have foreclosed further bargaining over the matter, regarding of whether [such foreclosure] is expressly articulated in the provision." *Id.* at 1018. And, "in cases where it is difficult to determine whether the subject matter sought to be bargained is an aspect of matters already negotiated, the Authority will examine all of the record evidence, including the parties' bargaining history, and decide whether the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances." *U.S. Dept. of Justice, Immigration and Naturalization Service*, 51 FLRA 1274, 1277 (1996).

Second, the Fourth Circuit's concerns regarding the FLSMRS' dispute resolution procedure are equally groundless.

The court of appeals' fear that unions could strategically withhold bargaining proposals supposes that mid-term bargaining always arises from circumstances the parties could have perceived or did perceive at the time of initial bargaining. That, of course, is not the case; if it were, then agency-initiated mid-term changes in conditions of employment would also be precluded, yet it is common ground that agency-initiated proposals for such changes are negotiable. And, indeed, the fact that in the federal sector, changes in applicable federal regulations can change the scope of bargaining makes it more likely than in the private sector that unions will be faced with new, unforeseeable circumstances affecting conditions of employment and the scope of bargaining during the term of an agreement.

Moreover, under the Fourth Circuit's view, the employer, but not the union, could engage in precisely such strategic withholding of negotiable proposals, creating an imbalance in bargaining power in the initial negotiations; if both parties have the power to engage in such strategies, it is more likely that neither will. Indeed, during the

impasse resolution procedures in the Federal Labor Statute (5 U.S.C. § 7118), the Federal Service Impasses Panel can consider allegations that such strategic manipulation of the bargaining process has occurred, and take those allegations into account in resolving any impasse.

Most importantly, the court of appeals' skewed version of the Federal Labor Statute's bargaining regime is much more likely to lead to a dysfunctional bargaining relationship that the alternative actually embodied in the Statute. Under the Fourth Circuit's version of that regime, unions, but not employers, are obliged to engage in speculative bargaining during initial negotiations regarding matters that are of no immediate concern but could conceivably become so in the future. Such hypothetical bargaining would multiply the divisive issues to be resolved in bargaining unnecessarily, not only because of sheer proliferation of issues but also because parties negotiating without a concrete appreciation of the interests at stake are less likely to be able to resolve their differences through trade-offs and compromises. Moreover, the statutory negotiability appeals processes (5 U.S.C. § 7117(b) & (c)) will only exacerbate the delays created by the union need to engage in such speculative negotiations. Under those processes—which have no parallel under the NLRA or RLA—negotiations can be delayed while the parties' appeal to the FLRA regarding the negotiability of proposals under the Statute. The more issues involved in the negotiations, the more opportunity for such delays. And, as noted earlier, the statutory negotiability appeals processes are ill-adapted to determining the negotiability of speculative proposals.

In the end, however, these competing policy considerations are beside the point. Rather, given the broad definition of collective bargaining in the FSLMRS and the absence of any indication that there are temporal or prior agreement limitations on the duty to bargain, the FLRA's construction of the Statute as requiring a limited range of

midterm bargaining is certainly "a reasonable one" that a reviewing court "must accept." *IRS v. FLRA*, 494 U.S. 922, 928 (1980).

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

MARK D. ROTH
80 "F" Steet, N.W.
Washington, D.C. 20001

KEVIN M. GRILE
25 West Chicago Avenue
Suite 410
Chicago, IL 60610

JONATHAN P. HIATT
JAMES B. COPPESS
815 16th Street, N.W.
Washington, D.C. 20006

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record